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No. 01-224

Supreme Court, U.S.
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In The

Supreme Court of the United States

JEANIE MENTAVLOS,

Petitioner,

v.

JOHN JUSTICE ANDERSON; JAMES SALEEBY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether upperclass students given limited authority to correct minor rules infractions but who instead violate written school policy expressly prohibiting abusive treatment or discrimination may fairly be deemed state actors at a college whose mission is to educate civilian students and produce community leaders?

II. Whether the Fourth Circuit properly applied the state action test by exhaustively analyzing the numerous facts and tests applicable in the state-action context, recognizing that these criteria lack rigid simplicity, and considering that state action has been found when a private entity is entwined with governmental policies?

III. Whether the actions of students at a state-supported college, acting in a manner proscribed by the college and known by the plaintiff to be violative of the applicable rules, can in law or fairness be attributed to the State of South Carolina?

IV. Whether the Fourth Circuit properly held that upperclass students at The Citadel were not state actors as they are no more members of the military than students attending other state-supported colleges in South Carolina and as the functions of military protection and training have not been delegated to them by the state or federal governments?

V. Whether the District Court properly granted summary judgment to Respondent Saleeby because Petitioner failed to produce any evidence of gender-based discrimination on his part?

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STATEMENT OF THE CASE

Petitioner, a former student at The Citadel, brought this action after leaving the school in 1996. All claims except those against student defendants John Justus Anderson, James Saleeby, and Edward Bohm were settled prior to the district court's final ruling on the pending summary judgment motions.

Initially, plaintiff's allegations depended upon proof that the student defendants acted in concert with one or more members of the college's faculty or staff. When it became apparent, however, that plaintiff could in no way establish the proof necessary to support this theory, the court allowed her to amend her complaint to allege that the individual cadet defendants were themselves state actors. *See Mentavlos v. Anderson*, 85 F. Supp. 2d 609, 611 (D.S.C. 2000). Plaintiff then withdrew her allegations under Section 1985, her allegations of due process violations under Section 1983, and her claims of a Section 1983 conspiracy. The only claims remaining against defendants Anderson and Saleeby allege violations of plaintiff's Fourteenth Amendment right to equal protection.

The parties consented to the District Court's resolution of any underlying factual questions relevant to the state actor inquiry, and a bench trial was held on November 17, 1999. On February 15, 2000, the District Court ordered that summary judgment be granted in favor of defendants Anderson and Saleeby, holding that they were not state actors. The District Court further concluded that the record revealed "no evidence that defendant Saleeby's actions towards the plaintiff were motivated by gender bias." *Id.* at 628.

On interlocutory appeal, the Fourth Circuit considered the actions of the student defendants under both prior state action analyses as well the flexible entwinement framework set forth recently in *Brentwood Academy v.*

Tennessee Secondary School, 212 S.Ct. 924 (2001). The Fourth Circuit affirmed the District Court's granting of summary judgment, holding that these "were students at a state-supported college, acting in a manner proscribed by The Citadel and known by Mentavlos to be violative of the applicable rules. Under these circumstances, their actions cannot in law or fairness be attributed to the State of South Carolina, which is the pertinent inquiry determined by the facts before us today." *Mentavlos v. Anderson*, 249 F.3d 301, 322 (4th Cir. 2001). Respondents are now before this Court opposing the Petition for a Writ of Certiorari.

STATEMENT OF THE FACTS

In the fall of 1996, Jeanie Marie Mentavlos decided to enter The Citadel as one of its first four female freshmen. Petitioner Mentavlos has alleged that she was mistreated by other student members of the Corps of Cadets. She claims that because of her gender, and as part of The Citadel's long fight to keep women out of the Corps, certain individual student cadets acted in concert with The Citadel and its leaders to sexually harass her and drive her from the school.[1] At the close of discovery, the plaintiff had produced no evidence to support her constitutional claims.[2]

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1 Petitioner has admitted that she has no evidence to suggest that either Saleeby or Anderson was involved in this alleged conspiracy.

2 The Petition for a Writ of Certiorari again re-hashes a host of issues not in any way associated with the current appellees (*i.e.*, Shannon Faulkner ordeal and internet photo) or the state action analysis.

Respondents were low level sergeants, and many cadets outranked them. They could not give official punishment to the plaintiff, as said action would have had to go through the chain of command and actually be approved by a member of The Citadel faculty. *Mentavlos*, 85 F. Supp.2d at 618-619. At most, what the defendants could do is simply write "white slips" or "performance reports" for the plaintiff so that she would have to face charges of violations[3].

In her Petition, Mentavlos appears to once again assert new allegations against these Respondents. Switching gears from her prior claims in an attempt to create sexual discrimination where none exists, she presents the contradictory statement that Saleeby set a fire "at her waist, close to her breasts, presumably so that her undergarments would show through." (Petition at p. 26). Never once has she presented this "presumption" in the past. Heretofore, she claimed that other defendants set her t-shirt on fire near her breast area, but Saleeby was not one of these defendants. If the Court reviews the photographs of that t-shirt, it is difficult to imagine how Ms. Mentavlos' breasts or undergarments could have possibly been located in the areas where the shirt was burned. However, the t-shirt is a non-issue. Defendant Saleeby has only been accused of setting Mentavlos' sweatshirt (not t-shirt) on fire, on the tag area. This tag was located near her waist, and near the pockets of the sweatshirt, as photographed. 85 F. Supp.2d at 612, 612 n.4. (Please see also photograph attached at App. 1).

The Fourth Circuit's proper affirmance on the state actor issue is of considerable importance as it will have a lasting and tremendous impact on the viability of The

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[3] Interestingly, defendant Saleeby only wrote the plaintiff a performance slip for merits and good conduct, not demerits.

Citadel's fourth class system as it currently exists.[4] This issue was properly decided as a matter of law because different juries could make varying determinations as to whether a mere cadet, who is not even of significant rank, can be a "state actor" for Section 1983 purposes. This issue is important not only to the military school itself, but to any parent who sends his or her child to military school. Heretofore, it was simply not foreseeable that sending a child to military college could subject that child to liability for having become an "arm of the state."

Throughout this litigation, plaintiff has made numerous, contradictory allegations, even as her theories of liability continued to metamorphose. Yet two things are certain. One, the plaintiff knew she did not have to obey illegal orders such as allowing herself to be set on fire. *Id.* at 614; *see also* 249 F.3d at 322. Two, she was free to leave the school at anytime and was certainly no prisoner there.

Petitioner now claims that the two remaining defendants, Jamie Saleeby and Justus Anderson, were most responsible for her plight. However, the record clearly shows that Cadet Anderson had little contact with Mentavlos. And Saleeby was, in fact, one of her few comforters as other cadets chided her for being a poor cadet. *See e.g.*, 85 F. Supp.2d at 615. Ironically, though Mentavlos now claims that Saleeby and Anderson were her worst foes, they just so happen to be the only two defendants who decided to challenge Ms. Mentavlos to prove her claims. She simply failed to prove those claims to the District Court, and the Fourth Circuit properly affirmed.

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[4] The Citadel could never afford to insure all cadets as potential state actors, and it is highly unlikely that any military school could afford said insurance.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit properly applied the state action test by exhaustively analyzing the numerous facts and tests applicable in the state-action context, recognizing that these criteria lack rigid simplicity, and considering that state action has been found when a private entity is entwined with governmental policies.

Relying upon this Court's recent opinion in *Brentwood Academy v. Tennessee Secondary School*, 212 S.Ct. 924 (2001), Petitioner claims that the district court applied too rigid a test for state action. An analysis of *Brentwood*, however, demonstrates that the entity considered there is in no way analogous to the student cadets in this case. In *Brentwood*, the Court examined the Tennessee Secondary School Athletic Association, "a not-for-profit membership corporation organized to regulate interscholastic sport among the public and private high schools in Tennessee that belong to it. No school is forced to join, but without any other authority actually regulating interscholastic athletics, it enjoys the memberships of almost all the State's public high schools (some 290 of them or 84% of the Association's voting membership), far outnumbering the 55 private schools that belong." *Id.* at 928.

When certain penalties challenged by Brentwood, a private school, were imposed, "all the voting members of the board of control and legislative council were public school administrators." *Id.* at 929. The entwinement down from the State Board was "unmistakable, just as the entwinement up from the member public schools is overwhelming. Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it." *Id.* at 933.

The Court did not abandon all prior state action tests in *Brentwood*, but presented the limited holding that when "the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test." *Id.* at 934.

Here, even a flexible analysis of the facts and relevant state action cases establishes that these student cadets were not state actors for Section 1983 purposes. As the opinion of the district court details, Petitioner produced evidence which, if believed, would show that the defendants were each involved in three incidents of harassment or improper treatment. As to Saleeby, these were the October 1996 lighting of plaintiff's clothing on fire and his kicking or brushing with his foot to extinguish the fire, the allegation that on one or more later occasions Saleeby kicked the plaintiff in the legs, and that on one occasion, Saleeby entered plaintiff's room wearing only non-uniform shorts and shower-type shoes. *Mentavlos*, 85 F. Supp.2d at 621-613.

As to Anderson, plaintiff asserted that while making crudely worded comments, Anderson pushed cardboard into her face and chin, leaving welts that lasted one or two days, that he stopped the plaintiff and another female cadet after they came in drunk just before Thanksgiving break and sent them to the company commander's room, and that he made threatening statements to the plaintiff at various times, including statements that he would physically harm or kill plaintiff or her brother, who was an upperclass cadet. The events alleged as to both defendants "all violate official written school policy." *Mentavlos*, 85 F. Supp.2d at 613-14.

Throughout this litigation and over the course of several theories of liability, plaintiff has been unable to establish any government participation in these private activities. In *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 658 (4th Cir. 1998), the Fourth Circuit reiterated that:

> [a]cting under color of state law is equivalent to that of state action under the Fourteenth Amendment. The state action requirement "reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" "This fundamental limitation on the scope of constitutional guarantees 'preserves an area of individual freedom by limiting the reach of federal law' and 'avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.'"

Id. at 658 (internal citations omitted).

"The essential state action inquiry is whether the government has been sufficiently involved in the challenged actions that it can be deemed responsible for the plaintiff's claimed injury. If there is no state action, then the court may not impose constitutional obligations on (and thus restrict the freedom of) private actors." *Yeo v. Town of Lexington*, 131 F.3d 241, 248-49 (1st Cir. 1997), *cert. denied* (June 1, 1998). As in *Yeo*, a case dealing with two student editors' decision not to publish an ad in a school yearbook, the actions of which plaintiff complains as to both Anderson and Saleeby were actions taken by students. The First Circuit explained in *Yeo* that the only decisions that it found "which assume there is state action do so where the parties agreed there was state action and it was undeniable the decision makers were government officials." *Id.* at 251. This is not such a case. Here, the students "are themselves at least facially private actors." *Id.* at 251.

Similarly, in *Indorato v. Patton*, 994 F. Supp. 300 (E.D. Pa. 1998), a district court held that a state university football player who struck a referee during a sanctioned football game was not a state actor for Section 1983 purposes. The court reached this result even though the athlete received a scholarship, liability insurance and a uniform free-of-charge from the school. *Id.* at 307. Rejecting plaintiff's arguments under the "symbiotic relationship," "joint participant," "nexus" and "government function" tests, the court noted that plaintiff had failed to establish that playing football at a state university was anything more than a student activity. Mentavlos has likewise failed to demonstrate that any of the acts taken against her by individual cadets were anything more than student activities, particularly in light of The Citadel administration's orders that the cadets' duty required that they deal with the freshman women in a professional manner. The Citadel's "Blue Book" clearly prohibits hazing and in fact, a cadet must obtain permission from a fellow cadet before engaging in even the slightest touching of him or her. 85 F. Supp.2d at 617.

Significantly, the *Indorato* court held that:

> Plaintiff's comparison of football players with state troopers is irrelevant. The fact that both football players and state troopers may, inter alia, wear uniforms, "function in a quasi-military structure," have "specific job assignments," and follow rules, . . . is not dispositive on the issue of whether Defendant is a state actor. As the court explains throughout this opinion, what matters is the nature and extent of Defendant's contacts with the state.

Id. at 305 n.10. The same must be said of the students in this case.

"The central inquiry in determining whether a private party's conduct will be regarded as action of the government is whether the party can be described "in all fairness" as a state actor." *Dowe* at 659. *Brentwood* did not eliminate this central inquiry. In *Hughes v. Halifax County School Board*, 855 F.2d 183 (4th Cir. 1988), a former school employee sued school officials and fellow employees under Section 1983, alleging that "he was assaulted, battered, and subjected to intentional emotional distress under color of state law because he was accosted by county employees with retaliation in their eyes, on county land, with county-owned rope, during work hours." *Id.* at 186. Rejecting the indicia of authority relied upon by Hughes, the Fourth Circuit stated that if the actions of his fellow employees amounted to state action, then "any employee of the state who commits a tort has potentially violated 1983. We cannot endorse such a result." *Id.* at 187. The same result would follow here if this Court were to permit a holding that these individual student cadets were state actors with respect to their involvement with this plaintiff. To do so would dictate that any Citadel cadet who commits a tort against an underclassman has potentially violated 1983. Such a result would be untenable and inconsistent with the purpose of this statute.

II. The actions of students at a state-supported college, acting in a manner proscribed by the college and known by the plaintiff to be violative of the applicable rules, cannot in law or fairness be attributed to the State of South Carolina.

Plaintiff initially attempted to characterize the actions of cadet defendants Anderson and Saleeby as "state action" by asserting that they "acted as aider, abettor or co-conspirator in concert with the state actions" of

The Citadel defendants. She abandoned this claim, however, when an examination of her evidence, revealed that she could not support such a theory, especially as to Anderson and Saleeby. To date, plaintiff has produced no evidence that any member of The Citadel administration was ever involved in any hazing, harassment, or otherwise improper acts. She has also been unable to establish that any member of The Citadel administration, faculty, or staff acquiesced in the acts of the individual students or that "administrators and faculty encouraged, sanctioned and refused to prevent hazing, harassment and abuse of the new female students, including plaintiff." *See Mentavlos*, 85 F. Supp.2d at 619 ("Nonetheless, it is quite clear that the school did not endorse or encourage abuses of the fourth class system and, in fact, endeavored to discourage abuses of the type alleged by plaintiff"). Thus, it is difficult to comprehend how the individual, unauthorized actions of either student Anderson or Saleeby could be categorized "in all fairness" as attributable to the State. Indeed, plaintiff's abandonment of the constitutional conspiracy causes of action is telling in that it epitomizes the lack of proof that she has been able to set forth to connect the private acts of the student cadets to any state actor.

The District Court and Fourth Circuit considered and noted numerous policies demonstrating that the actions of which plaintiff has complained were forbidden and that the school was taking steps to eliminate such instances. For example:

1. Hazing. Hazing is a violation of the South Carolina State Law and Citadel Regulations and is punishable by expulsion from The Citadel. Hazing is defined as striking, offering bodily harm, treating with violence, verbal abuse or any treatment of a tyrannical, abusive, or humiliating nature by a member of a higher class to a member of a lower class. Hazing includes requiring performance of personal service or humiliating verbal abuse.

2. Other major violations of the Fourth Class System on the part of upperclassmen, which may not constitute hazing, are considered serious offenses and are punished in accordance with Annex B.

3. All violations of the Fourth Class System are reported immediately. Hazing and major violations of the Fourth Class System are reported to the Commandant within one hour of its discovery, regardless of the time of day.

Blue Book, (Supp. App. at pp. 364-423) Chap. 16-H.1-3. See also Blue Book, Chap. 16.J.7. (also prohibiting requiring freshmen to perform tasks of a personal nature for upperclassmen); Chap. 16.G.3. (prohibiting touching without permission and allowing touching only to provide correction and only in an open area in full view of at least one other cadet); & 16.G.4. (allowing freshmen to "focus exclusively on academics" while attending class and during published study periods).

The Blue Book provides as follows regarding contact with freshmen:

> K. Contact with Fourth Classmen.
>
> * * * * * *
>
> 2. Training, counseling, and inspecting fourth classmen is restricted to the chain of command. Correcting and reporting fourth classmen is the responsibility of all cadets and officers associated with The Citadel who may observe an infraction of the part of a fourth classman.

Blue Book, Chap. 16.K.2.

> * * * * * *
>
> "All personnel have an obligation to report any Fourth Class System violations to an appropriate authority." Blue Book, Chap. 16.F.4. Freshmen also have formal rights to appeal their treatment as freshmen. Blue Book, Chap. 16.M.
>
> The school expressly prohibits discrimination on the basis of gender and various other impermissible criteria. Blue Book, Chap. 1.H.1-6. The Blue Book provides extensive guidance as to what is considered sexual harassment and provides a variety of means for handling complaints. Blue Book, Chap. 1.H.1- 7. Training was given to the higher ranking cadet officers prior to the arrival of the female students to insure the anti-discrimination policy was disseminated.

Mentavlos, 85 F. Supp.2d at 617-618; *see also* 249 F.3d at 308-310.

The record simply does not support plaintiff's argument that any harassment or hazing by other student cadets that took place at The Citadel was controlled or directed by school officials. Indeed, the uncontradicted testimony has demonstrated that any isolated acts by individual cadets were in no way coerced or even encouraged by the administration. To the contrary, such conduct was discouraged and cadets found to have participated in such activities were disciplined, and even expelled, a punishment viewed as overly harsh by many observers.

In fact, "the very abuses plaintiff alleges as to the present defendants were punished or adequately addressed when brought to the school's attention. Plaintiff reported the Anderson cardboard incident when it occurred. Anderson was punished. When plaintiff raised concerns that males (including Saleeby) were wearing boxer shorts in view of the female cadets, the cadets were reminded of the need to dress appropriately." *Mentavlos*, 85 F. Supp. 2d at 619.[5]

The plaintiff's reports as to other allegations of abuse also led The Citadel to impose serious, if not severe, sanctions. "A number of cadets, including these defendants, were effectively placed on house arrest during the investigations." "While the school's response to plaintiff's December reports necessarily did not occur until after plaintiff left the school, it evidences the fact that the school did not condone the behaviors at issue. Perhaps most telling is the fact that several cadets involved in the alleged instances of harassment (including Anderson) resigned, rather than face a commandant's

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[5] Plaintiff was mistaken as to Saleeby wearing boxer shorts, as those shorts were obtained for the FBI and by the court. They are thick, gym like shorts with a company logo and no "flap" or opening as found on boxer shorts. 85 F. Supp.2d at 619 n.15

board. This strongly suggests that these cadets were well aware that the incidents of alleged hazing would not be treated lightly." *Id.* at 619-620.[6]

Private conduct constitutes state action only if it is compelled, or significantly encouraged, by the state, not when it is merely authorized, or acquiesced in, by the state. *See e.g., Leeds v. Meltz*, 85 F.3d 51, 54 (2nd Cir. 1996)("extensive regulation and public funding, either alone or taken together, will not transform a private actor into a state actor; instead, the state must have exerted its coercive power over, or provided significant encouragement to, the defendant before the latter will be deemed a state actor"). Here, there was neither authorization nor acquiescence.

III. The Fourth Circuit properly held that upperclass students at The Citadel were not state actors as they are no more members of the military than students attending other state-supported colleges in South Carolina and as the functions of military protection and training have not been delegated to them by the state or federal governments.

Petitioner's argument relies heavily upon her assertion that "it goes without saying that training civilians for a military career is a traditional governmental function, since preparing and controlling the military is a central and exclusive governmental role." The record makes clear, however, that

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[6] Saleeby faced a commandant's board and was suspended from the school for one year. Anderson's resignation precludes his return to the school. 249 F.3d at 309-310.

> [w]hile The Citadel bases its educational experience on a military model, the comparison to the [service] academies ends there. The education is no more at government expense than at any other state supported college. Neither do Citadel students incur a service obligation simply because they attend The Citadel. Most significantly, Citadel cadets are not members of the armed forces, unless they are members of the reserve as a consequence of signing a contract in a ROTC program. In that regard, Citadel cadets stand in no different position than an ROTC student at any other college, whether public or private.

Mentavlos, 85 F. Supp.2d at 622.

Colonel Joseph Trez, Commandant of Cadets, testified that the primary mission of The Citadel is to educate students. It does so within a military framework to prepare its students for postgraduate work as leaders and managers of our country. Trez recalled that in 1996, two of the 1800 students were commissioned officers, and only because they had attended an early commissioning program elsewhere. And even those commissions were not federally recognized until the end of their college years. None of the cadets involved here–Mentavlos, Anderson, or Saleeby–held ROTC contracts. It was stipulated that only about one-third of the Corps of Cadets enters the military upon graduation. 249 F.3d at 314-316. Further, even if the school itself were performing an exclusive public function, it does not automatically follow that the students themselves would be state actors.

With respect to other factors of the state action analysis, it is clear that:

> it is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory of subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action. A private school's discharge of employees was not state action in spite of the fact that the school was extensively regulated and highly subsidized by the state. The state's regulatory and funding activities had not compelled the discharge of those employees, *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982); *see also Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), just as they had not compelled a private nursing home's involuntary transfer and discharge of a group of Medicaid patients.

Arlosoroff v. National Collegiate Athletic Ass., 746 F.2d 1019, 1022 (4th Cir. 1984). The fact that state assistance has been given to The Citadel and that its professors and administrators are state employees is likewise not enough. Nor are the statutes creating and regulating The Citadel unique under South Carolina law. The University of South Carolina receives aid from the State, and similar statutes regulate the powers and composition of its board of trustees, its fund-raising activities, and its acquisition of facilities. *See e.g.* S.C. Code Ann. §59-117-10, *et seq.* It simply does not follow, however, that such regulation and funding would render the *students* at such institutions state actors.

In support of her argument that the state itself would consider the students state actors, plaintiff relies upon that the categorization of The Citadel as a "Senior Military College" by 10 U.S.C. § 2111a, amended in 1997 in response to action taken by the Secretary of Defense. The findings of fact upon which plaintiff relies note "the long-standing relationship of the Armed Forces with the senior military colleges" and the interests of the United States Department of Defense. Plaintiff also cites a line of authority relating to Section 1983 actions and National Guard officers and seemingly analogizes the state and federal interrelationship of that entity to the "special military" status of The Citadel.

Plaintiff continues to cite *Alton v. Texas A&M University*, 168 F.3d 196 (5th Cir. 1999), as one of the judicial opinions which "have assumed that upper-class cadets imposing discipline on lower class cadets are "state actors." A reading of both the Fifth's Circuit's opinion and the district court's opinion in *Alton v. Hopgood*, 994 F. Supp. 827 (S.D. Tex.), however, demonstrates that the state action argument was never pursued by the student defendants in the Texas A&M case. The Texas district court's opinion did not even consider this step in the Section 1983 analysis and the Fifth Circuit's language seems to ask why such the state action argument was not asserted.

Of greater significance is the fact that plaintiff devotes much of her argument in this section to how Congress views the unique positions of the six military colleges and then misses the key step in the argument by failing to analyze how the state views the students themselves. In fact, plaintiff's only mention of the state's viewpoint during this discussion is to set forth the following statutory language:

> All members of the board of visitors, administrative staff and faculty personnel of The Citadel, the Military College of South Carolina, shall be eligible to be commissioned officers in the unorganized militia of South Carolina and the Governor shall issue commissions to such of them as are designated by the college according to the rank prescribed by that institution.

S.C. Code Ann. § 25-1-520. But the question here is not whether the college, board of visitors, administrative staff or faculty personnel are state actors, but whether student cadets, under the facts of this case, are. And they are noticeably absent from this statute, which is the only such evidence which plaintiff presents in her brief to support the "state consideration" factor.

> Certainly, The Citadel uses a military model that more closely resembles life at a service academy than life at most college campuses--even those offering ROTC programs. The Citadel is not, however, primarily in the business of training military officers. Its mission is the production of "the whole [person]," not the production of citizen-soldiers. . . . Plaintiff's theory equating The Citadel to a service academy is also troubling in that this court can see no significant distinction between what The Citadel does and what many private secondary schools do: using a military model as a basis for instilling discipline and providing leadership training.

Under plaintiff's theory, every high school military academy would be engaged in an "exclusive state function." The long standing prevalence of such private institutions, demonstrates the non-exclusivity of military model training. Indeed, it would appear that most high schools based on a military model are private institutions, although Junior ROTC is offered at a number of public schools as a component of the educational offerings.
Mentavlos, 85 F. Supp.2d at 622-623.

This is not the rare case in which the plaintiff can complain that any failure of The Citadel to intervene in actions taken by private persons has given rise to state action because again, the evidence is undisputed that plaintiff failed to avail herself of the many resources that the school made available to her to address any problems that she might encounter as a freshman cadet. *See* 249 F.3d at 309-310 (noting that Mentavlos did not voice the majority of her complaints until just before withdrawing in December).

The District Court and Fourth Circuit properly concluded "that The Citadel is in the business of providing a post-secondary education with a goal of assisting students to achieve a well-rounded development in all spheres of life and with an emphasis on leadership training. That the school seeks to achieve these goals through a military model may make its system of training fairly unique. It does not, however, convert the primary business of The Citadel into that of producing military officers. It is beyond dispute that providing post-secondary education is not traditionally an exclusive state function. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) (while providing high school level education is a public function, it is not traditionally the exclusive province of the state)." *Mentavlos*, 85 F. Supp.2d at 624.

The ramifications of finding state action in this case are dangerous. A holding that student cadets are state actors, particularly those not specifically in a plaintiff's chain of command, could convert any state law tort

occurring between students into a potential constitutional claim in the federal courts. The result urged by the Petitioner could be extended to encompass the students at all manner of institutions, as the District Court and Fourth Circuit prudently recognized.

IV. The District Court properly granted summary judgment to Respondent Saleeby because Petitioner failed to produce any evidence of gender-based discrimination on his part.

Here, even if defendant Saleeby could be fairly categorized as a state actor, the District Court properly entered summary judgment in his favor as the record reveals no evidence that Saleeby's actions toward the plaintiff were in any way motivated by gender bias. "In her deposition in this action, plaintiff conceded that, with the exception of the fire incident, Saleeby's actions towards her were just playful harassment" and that from the beginning, she felt "that [Saleeby] was a professional cadet." *Mentavlos*, 85 F. Supp.2d at 615.

It is now evident that Saleeby did not wear "only boxer shorts" when entering plaintiff's room. *Mentavlos* at 619 n.15. And even the most cursory glance at the photograph of the shirt that plaintiff was wearing during the fire incident confirms that her breasts were in no way involved. (Appendix at p.).

Although the District Court held that plaintiff's evidence of gender motive as to defendant Anderson was weak, it declined to enter summary judgment in Anderson's favor on this basis. But as there is no suggestion in the record that Saleeby 's actions were *ever* motivated by any gender-based animus toward the plaintiff, and as his actions indeed suggest the opposite, the District Court properly entered summary judgment for Saleeby on this issue as well.

CONCLUSION

For the reasons stated, a writ of certiorari should not be granted to review the proper decision and judgment of the Fourth Circuit.

Respectfully submitted,

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